

The claimant suffered burn injuries to his hands, arms, neck, face and ear while working on an electrical panel in the course of his employment with respondent. The respondent argued that compensation should be disallowed pursuant to K.S.A. 44-

501(d)(1) (Furse 2000) because claimant failed to use a reasonable guard and protection against injury provided by respondent.

The Administrative Law Judge (ALJ) concluded that respondent did not have a safety policy in place at the time of the accident which required claimant to wear either a hard hat or safety gloves. Consequently, the ALJ concluded the respondent failed to meet its burden of proof that claimant failed to use a safety guard. The ALJ then determined the claimant suffered a 17 percent permanent partial whole body functional impairment based on the average of Drs. Koprivica's and Korentager's impairment ratings.

The respondent requests review of whether the claimant failed to use a reasonable guard and protection against injury which was provided by the employer pursuant to K.S.A. 44-501(d)(1) (Furse 2000). Respondent argues the claimant's failure to wear a hard hat caused the injury claimant suffered.

The claimant requests the Board to affirm the ALJ's finding that the respondent failed to meet its burden of proof to establish claimant failed to use a safety guard. Claimant further argues the Board should adopt Dr. Koprivica's opinion and increase the functional impairment to 27 percent.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's Award should be affirmed. The ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein.

Claimant suffered burns to his hands, arms, neck, face and ear while performing work on an electrical panel that still had electricity running to it. Respondent defended the claim for compensation arguing claimant's failure to use safety equipment, a hard hat, resulted in his injuries. Accordingly, respondent argues the claim for compensation should be disallowed pursuant to K.S.A. 44-501(d)(1) (Furse 2000).

K.S.A. 44-501(d)(1) (Furse 2000) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's wilful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The ALJ concluded the statute was not applicable because the facts established that respondent did not have a safety policy in place that required claimant to wear a hard hat at the work site where the accident occurred. The Board agrees.

Initially it should be noted that although respondent had a policy against working “hot,” i.e. while electricity had not been turned off, nonetheless that safety policy was routinely disregarded and not enforced. Because the policy was not rigidly enforced by respondent, particularly where claimant was told by his supervisor to perform the work “hot” on the electrical panel, it cannot now be raised as a defense by respondent.<sup>1</sup>

The failure to follow the policy against working “hot” came to the attention of respondent’s safety director, Delmer Cook. As a result, Mr. Cook developed a hot kit which contained safety gear to be worn by respondent’s employees while performing “hot” work. However, as noted by the ALJ, the claimant did not receive training on using the hot kit until after the accident. It cannot be said claimant failed to use such safety equipment when he had neither been trained on its use nor directed to use such equipment before the accident.

The respondent did have a policy which required a hard hat to be worn at a workplace that was under construction, remodeling or demolition. In this case the claimant was simply working on an electrical panel at an existing plant which was not under construction, remodeling or demolition. Consequently, the claimant was not required to wear a hard hat while working on the electrical panel. Since respondent did not make it mandatory for the claimant to wear a hard hat, it cannot now come forward and claim that the claimant willfully refused to use a reasonable and proper safety device.

The claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment with respondent and is entitled to compensation for the injuries he suffered as a result of his work-related accident. The testimony regarding the nature and extent of disability was provided by Drs. Koprivica and Korentager. Both doctors utilized the *AMA Guides*<sup>2</sup> in providing their impairment rating opinions.<sup>3</sup> The ALJ determined both doctors’ opinions were credible and, after reducing Dr. Koprivica’s rating based on loss of grip strength, the ALJ averaged the ratings and concluded claimant suffered a 17 percent permanent partial whole body functional impairment. The Board agrees and affirms.

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<sup>1</sup> See K.A.R. 51-20-1.

<sup>2</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>3</sup> Although the ALJ’s Award states otherwise, Dr. Korentager did testify at page 20 of his deposition that he used the *AMA Guides*, Fourth Edition to determine his impairment rating.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 15, 2003, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Timothy E. Power, Attorney for Claimant  
John D. Jurcyk, Attorney for Respondent and its Insurance Carrier  
Kenneth J. Hursh, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director